

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0899, In the Matter of Hedwig Kirby-Simmon and Thomas Kirby, the court on September 10, 2007, issued the following order:

The respondent, Thomas Kirby, appeals an order of the trial court addressing his request for modification of alimony. He argues that the trial court erred in: (1) failing to require a financial affidavit; (2) failing to review all of the circumstances of both parties; (3) failing to allow full discovery of the petitioner's financial status; and (4) using the respondent's pension as the sole factor in reviewing his request for modification of alimony. We vacate and remand.

We review a trial court's order on a request to modify alimony under an unsustainable exercise of discretion standard. In the Matter of Arvenitis & Arvenitis, 152 N.H. 653, 654 (2005); see State v. Lambert, 147 N.H. 295, 296 (2001) (exercise of discretion unsustainable where appealing party demonstrates that court's ruling is clearly untenable or unreasonable to the prejudice of its case).

The respondent first argues that the trial court erred in failing to require that the petitioner, Hedwig Kirby-Simmon, file a financial affidavit. In its order, the trial court stated that "the ordinary standards to be applied in determining whether alimony should be modified or terminated for changed circumstances do not apply." The trial court based this ruling upon the parties' stipulations incorporated into their divorce decree addressing the payment of alimony; these stipulations provided that the alimony obligation of the respondent effective upon his retirement was not modifiable for any reason.

We have previously held that whether parties have waived their right to seek modification of an agreement governing alimony is irrelevant; "RSA 458:14 grants the court the authority to revise any order made by the court." Norberg v. Norberg, 135 N.H. 620, 624 (1992). "We will not allow the parties to effectively divest the court of its statutory authority to modify a decree by merely agreeing that no modification of their agreement shall be sought." Id. "Thus, regardless of the language in the stipulation, the court retains the power to modify orders concerning alimony upon a proper showing of changed circumstances." Id.

Having determined that the trial court erred in concluding that its review of the request for modification was constrained by the language of the parties' divorce decree, we also conclude that its ruling that the petitioner's financial circumstances were irrelevant to an examination of any changed circumstances

in the respondent's retirement was erroneous. We therefore vacate the order of the trial court and remand this case for further review consistent with this order. See Fam. Div. R. (Domestic Relations) 13; cf. In the Matter of Rohdenburg & Rohdenburg, 149 N.H. 276, 278 (2003) (Superior Court Rule 197 requires each party to file financial affidavit at every marital hearing involving financial matters; duty of full disclosure required thereunder is mandatory and cannot be waived by any party or the court).

Vacated and remanded.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**